

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 9/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

REGINA vs. EVAN COLE

Phillip Sutherland for the applicant

Miss Marcia Hughes for the Crown

October 29 and November 2, 1990

MORGAN, J.A.:

The applicant, Evan Cole, was charged on an indictment for the offence of murder in that on the 16th day of September, 1988, he murdered Wayne Boothe. The matter was heard in the Home Circuit Court, Kingston on the 11th, 12th and 15th January, 1990, by Cooke, J., with a jury when he was convicted and sentenced to death.

On the night of the 16th September, 1988, the deceased, Gary Smith and his friend Michael Angel were at Burlie's restaurant at 27½ Tarrant Drive in St. Andrew. Smith worked at this restaurant as a waiter but Hurricane Gilbert had just struck so his friend, the deceased and himself were then sleeping in the upholstery shop adjoining the kitchen, which served the restaurant. Evan Cole, the applicant, came there about 3:00 p.m. that night and went in the kitchen where the deceased, Gary Smith and Michael Angel were cooking.

Smith's account is that he saw the applicant with a gun and heard him say "A gwine kill all a oonu". Smith moved out of the kitchen and went into the upholstering shop and Angel followed. While in the shop, Smith heard the deceased say, "Evan, mine you shoot me", and then the explosion of a gun. The applicant ran out, held Smith and threatened to shoot him if he said anything to anyone. The applicant threw the gun through a grilled window and ran away. The deceased ran out of the kitchen holding his chest and said to Smith, "Cat, Cat, Evan shoot me". Smith, who is known as "Cat", took him to the door, put him to lie down, went for transport and later returned and found him dead.

Angel agreed with Smith that they were all in the kitchen, that Smith and himself left the applicant and the deceased there then they heard an explosion. He, however, did not observe the gun in the hand of the applicant nor heard deceased saying, "Evan, mine you shoot me" and differed from Smith in that he said Evan ran out saying, "Who kill Blacka, who kill Blacka" (i.e. Boothe) and that the deceased said, "Mr. Watson, I get shot".

Dr. Bhatt's, who performed the post-mortem examination, said he found a firearm entry wound in his chest which was not burnt or tattooed, which indicated that the point of the gun, when fired, was not less than twelve to eighteen inches away, at an angle from left to right and in his opinion it would not have been possible for the deceased, if right-handed, to have shot himself.

When the applicant was arrested, charged and cautioned by Detective Sergeant Spence, he said, "Ah him shoot himself sah".

The applicant gave sworn evidence and said that he had gone to the restaurant and was surprised to see the

deceased there as Smith had a dispute with the deceased prior to the hurricane and the deceased had evicted Smith from his house. Smith and Angel left the kitchen to the shop and then he heard an explosion and the deceased, who was leaning on the inside door of the upholstery shop, held his chest and said, "Lord, Lord, Mr. Williams I get shot". He then asked Smith, "Who shot Blacka?" and Smith replied that he did not know. He ran out through the door, passed a police jeep and went home.

The Crown relied on circumstantial evidence, clearly set out by the learned trial judge in his summation (p. 104):

"Now, let us now return to circumstantial evidence. These are the factors which you will take into consideration if you accept them: (1) That the accused came to Burlie's armed with a gun and said, 'Me a go kill off the whole of unoo'. That is if you accept it. (2) That at the time of the shooting only the accused and the deceased were in the kitchen. (3) That just before the shooting the deceased said, if you accept it, 'Mine you shoot me'. (4) That the explosion came from the kitchen, and on this aspect both Crown witnesses agreed. Of course the accused man said it came either from outside or from some other part of the house. (5) That the accused (sic) man said, 'Cat, Cat, Evan shoot me', and (6) that the accused man told the police a lie."

The defence was a mere denial of the shooting.

The learned trial judge, in an impeccable and well-structured summing-up, directed the jury, in refreshingly elegant and clear language, on the law, the discrepancies and on the question of credit, which was the real issue in the case.

Mr. Sutherland said that he perused the summing-up and with great candour has told us that, having done so, he found nothing arguable. We entirely agree.

For these reasons, the application for leave to appeal is refused.